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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

JOSHUA MCDANIELS,

Defendant and Appellant.

D073692

(Super. Ct. No. SCD264069)

APPEAL from a judgment of the Superior Court of San Diego County, David M. Rubin, Judge. Affirmed.

Daniel J. Kessler, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Meredith S. White and Steve Oetting, Deputy Attorneys General, for Plaintiff and Respondent.

A jury convicted Joshua McDaniels of first degree murder (Pen. Code,<sup>1</sup> § 187). At a bifurcated proceeding, the jury also found that McDaniels was sane at the time he committed the offense. The court sentenced McDaniels to prison for 25 years to life.

McDaniels appeals, arguing that we must remand this matter to allow the trial court to consider granting McDaniels mental health diversion under section 1001.36, which became effective after McDaniels committed the homicide. To this end, McDaniels asks this court to follow *People v. Frahs* (2018) 27 Cal.App.5th 784 (*Frahs*), review granted December 27, 2018, S252220 and conclude section 1001.36 is retroactive.

Our high court granted review in *Frahs* to address whether the mental health diversion statute applies retroactively. Yet, we do not need to weigh in on this issue because, effective January 1, 2019, the Legislature amended section 1001.36 to exclude from consideration those defendants charged with murder. (See § 1001.36, subd. (b)(2)(A).) McDaniels was charged with and convicted of murder. As such, even if we assume section 1001.36 is retroactive, McDaniels is not eligible for the mental diversion program under that statute. We therefore affirm the judgment.

### FACTUAL BACKGROUND

Because this appeal presents a pure question of law, we need not discuss in detail the underlying facts of McDaniels's crime. Suffice it to say, on October 9, 2015, McDaniels killed the victim while both men were in a "dress out holding cell" in a local jail.

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<sup>1</sup> Statutory references are to the Penal Code unless otherwise specified.

At trial, McDaniels's primary defense was that he was suffering from a mental health disorder at the time he killed the victim.

At the bifurcated sanity phase of the trial, one expert witness opined that McDaniels was insane at the time he committed the homicide, and two other experts disagreed. Two of the experts stated that McDaniels suffers from schizoaffective disorder. The other expert testified that McDaniels suffers from an "unspecified psychotic disorder."

Ultimately, the jury found McDaniels was sane at the time of the killing.

## DISCUSSION

Effective June 27, 2018, the Legislature created a diversion program for defendants with diagnosed and qualifying mental disorders such as schizophrenia, bipolar disorder, and posttraumatic stress disorder.<sup>2</sup> (§ 1001.36, subd. (a) & (b)(1)(A).) A court may grant pretrial diversion under section 1001.36 if the court finds: (1) the defendant suffers from an identified mental disorder; (2) the mental disorder played a significant role in the commission of the charged offense; (3) the defendant's symptoms will respond to treatment; (4) the defendant consents to diversion and the defendant waives his or her speedy trial rights; (5) the defendant agrees to comply with treatment; and (6) the defendant will not pose an unreasonable risk of danger to public safety, as defined in section 1170.18, if the defendant is treated in the community. (§ 1001.36, subd. (b)(1)(A)-(F).)

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<sup>2</sup> For purposes of our analysis here, we assume McDaniels is suffering from a qualifying mental disorder under section 1001.36, subdivision (b)(1)(A).

If the court grants pretrial diversion, "[t]he defendant may be referred to a program of mental health treatment utilizing existing inpatient or outpatient mental health resources" for "no longer than two years." (§ 1001.36, subds. (c)(1)(B) & (c)(3).) If the defendant performs "satisfactorily in diversion, at the end of the period of diversion, the court shall dismiss the defendant's criminal charges that were the subject of the criminal proceedings at the time of the initial diversion." (§ 1001.36, subd. (e).)

Effective January 1, 2019, the Legislature amended section 1001.36, to exclude those defendants charged with murder. (See § 1001.36, subd. (b)(2)(A).) The People thus argue that McDaniels is not eligible under section 1001.36 even if we find the statute is retroactive. McDaniels counters that the failure to give him the opportunity for mental health diversion on remand violates the ex post facto clauses of the California and United States Constitutions. We disagree.

"A statute violates the prohibition against ex post facto laws if it punishes as a crime an act that was innocent when done or increases the punishment for a crime after it is committed." (*People v. White* (2017) 2 Cal.5th 349, 360.) The ex post facto prohibition ensures that people are given "fair warning" of the possible punishment they may be subjected to if they violate the law; they can rely on the meaning of the statute until it is explicitly changed. (*Weaver v. Graham* (1981) 450 U.S. 24, 28-29.)

On October 9, 2015, McDaniels committed the crime of murder. On that date, the possibility of pretrial mental health diversion did not exist (the earlier version of section 1001.36 became effective on June 27, 2018). Consequently, McDaniels could not have relied on the possibility of pretrial mental health diversion when he committed the

crime of murder. Moreover, the Legislature's amendment of the statute to eliminate murder as an eligible offense (effective January 1, 2019), did not make an act unlawful that was not formerly unlawful, nor did it increase the punishment for any crime. (See *People v. White, supra*, 2 Cal.5th at p. 360.) Thus, the amendment to section 1001.36 does not violate ex post facto considerations.

In short, even if we assume section 1001.36 is retroactive, McDaniels is ineligible for mental diversion as he was charged with murder. (See § 1001.36, subd. (b)(2)(A).)

#### DISPOSITON

The judgment is affirmed.

HUFFMAN, Acting P. J.

WE CONCUR:

HALLER, J.

GUERRERO, J.